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the petitioner filed in that court a petition for a rehearing, which was denied on March 14, 1927, and a certified copy of the record obtained and a writ of certiorari presented to this court, which was granted.

SPECIFIC CLAIMS ADVANCED AND RULINGS MADE IN LOWER COURT WHICH ARE RELIED UPON AS THE BASIS OF THIS COURT'S JURISDICTION.

The petitioner claims that the lower court denied petitioner's right to have the demurrer to the complaint sustained under the Act of Congress giving to the Interstate Commerce Commission exclusive jurisdiction in the matter of distribution of the available coal car supply, and in holding that it was the duty of a railroad company to furnish all cars demanded. In the complaint of the respondents it is alleged that the petitioner herein was a railroad company and a common carrier of coal and that its line of railroad extended to various mines in Sebastian County, Arkansas; that petitioner had failed to furnish to respondents, during the period between June 22, 1922, to January 1, 1923, coal cars demanded by them in which to ship the prod-

uct of their coal mine located in Sebastian County, and prayed damages in the sum of $33,676.00. (R. 4). Petitioner filed a demurrer to the complaint in which it alleged:

I.

"That said complaint does not allege facts sufficient to constitute a cause of action within the jurisdiction of this court.

II.

"That the Act of Congress, known as the 'Interstate Commerce Act,' as amended by the Transportation Act and other acts of Congress amendatory thereof, confers exclusive authority upon the Interstate Commerce Commission in the matter of the distribution of coal cars and jurisdiction in matters of alleged failure to furnish same." (R. 5).

The demurrer was overruled by the Circuit Court, and its judgment was affirmed by the Supreme Court of Arkansas.

Petitioner then filed its answer to the complaint of the plaintiffs, denying each material allegation thereof. There was a trial by jury and a judgment in favor of the respondents in the sum of $2,000.00.

THE STATUTORY PROVISIONS UNDER WHICH THIS COURT'S JURISDICTION IS INVOKED.

The petitioner claims that under the Judicial Code of the United States, Section 237, as amended by the Act of February 13, 1925 (43 Stat. at Large, p. 938) it was denied rights, claims and immunities under an Act of Congress. Petitioner claims that the Act of Congress, approved February 28, 1920, vests in the Interstate Commerce Commission exclusive jurisdiction in the matter of the distribution of the available coal car supply. This right was denied petitioner by the Supreme Court of Arkansas.

CASES WHICH SUSTAIN THE JURISDICTION OF THIS COURT

The following cases are believed to sustain the jurisdiction of this court:

U. S., et al., Appellants, v. Berwind-White Coal Mining Co., et al., and companion cases (decided by this Court May 31, 1927.)

L. & N. R.R. Co. v. Brashear et al., 289 S.W. Rep. 1094.

G. C. & S. F. Ry. Co. v. Hefley, 158 U.S. 98.

U. S. of America v. New River Co., 265 U.S. 534.

N. Y. C. & H. R.R. Co. v. Beaham, 242 U.S. 148.

Corona Coal Co. v. Southern Ry. Co., 266 Fed. 726.

B. & O. R.R. Co. v. Lambert Run Coal Co., 267 Fed. 776.

Cleveland & Western Coal Co. v. Baltimore & Ohio R.R. Co., 283 Fed. 995.

Director General of Railroads, et al., v. Viscose Co., 254 U.S. 498.

A STATEMENT OF THE CASE

The Supreme Court of Arkansas, in its opinion, states:

"Plaintiffs below, appellees here, instituted this action against the defendant below, appellant here, to recover damages for failure to furnish cars in which to ship coal from appellees' mine, located near Excelsior, in Sebastian County, Arkansas. Appellees alleged in sustance that, in June, 1922, they were operating under a lease a coal mine on which they had expended and were exepending large sums of money; that the appellant was an Arkansas corporation, having a line of railroad extending to appellee's coal mine, over which appellee shipped coal in car-

load lots * * * . The appellees alleged that the refusal of appellant to furnish coal cars compelled appellees to shut down their mine. Appellees then set forth in detail the damages alleged to have accrued to them by reason of the alleged wrongful failure of the appellant to furnish coal cars as demanded by the appellees. * * *

"The appellant demurred to the complaint on the ground that it did not state a cause of action within the jurisdiction of the court, that 'the act of Congress known as the Interstate Commerce Act, as amended by the Transportation Act and other acts of Congress amendatory thereof, confer exclusive authority upon the Interstate Commerce Commission in the matter of distribution of coal-cars and jurisdiction in matters of alleged failure to furnish the same.'

"Appellant's demurrer was overruled, and it answered, denying specifically the allegations of the complaint. It was alleged in substance that, under the orders of the Interstate Commerce Commission, certain rules and regulations adopted by the United States Railroad Administration in December, 1923, were in effect during the period alleged in the complaint. The appellant

alleged that the appellees' mine was what is termed a 'wagon-load mine,' in that the coal produced at the mine was hauled in a wagon to the spur or switch-track upon which it was loaded into the cars, and was therefore not rated as mines loaded from a tipple were rated under the rules of the Interstate Commerce Commission."

The court further states in its opinion:

"The testimony is exceedingly voluminous, and we deem it wholly unnecesary to set forth the testimony bearing upon the issue as to whether or not the appellant failed to furnish cars as alleged in the complaint, and, if so, the amount of damages appellees sustained by reason of such failure, because, if the trial court had jurisdiction of the action, we are convinced that the testimony was amply sufficient to sustain the verdict on the issue of whether or not the appellant failed to furnish cars and also as to the amount of damages which accrued to appellees by reason of such failure. The trial resulted in a verdict and judgment in favor of the appellees in the sum of $2,000. Judgment was entered in favor of the appellees for that sum, from which is this appeal."

The court then quotes the Transportation Act of Congress of February 28, 1920, in its opinion, and also the later Act of September 22, 1922, "An act to declare a national emergency to exist in the production, transportation, and distribution of coal and other fuel, granting additional powers to the Interstate Commerce Commission," etc.

The Supreme Court of Arkansas, after quoting the Acts of Congress, in its opinion, further states:

> "Learned counsel for the appellant contend that it was the purpose of Congress, in the above enactments, to vest the Interstate Commerce Commission with supreme power in the matter of distribution of coal-cars, regardless of whether the coal was to be shipped in intra or interstate commerce. Counsel for appellant say: 'It is the contention of the defendant that all State statutes and common-law obligations are swept away, as far as the transportation of coal, or the furnishing of cars in which to transport the same, by the provisions of the Transportation Act, and the later emergency act of September 22, 1922.' We cannot agree with counsel in this contention."

Sections 8, 9 and 22 of the Interstate Commerce

Act, 24 Stat. at Large, p. 379, are quoted by the court, and the court further states:

> "These provisions of the Interstate Commerce Act, approved February 4, 1887, were not repealed, expressly or by implication, by the provisions of the Transportation Act of Congress of February 8, 1920, and the Emergency Act of September 22, 1922, upon which counsel for appellant relies. On the contrary, the above provisions of Sections 8, 9 and 22 of the Interstate Commerce Act were in full force and effect when appellee's cause of action is alleged to have accrued. Counsel for the appellees concede that the cars which it is alleged appellant failed to furnish were ordered for and to be used in interstate shipments. Such being the case, the provisions of Section 22 of the Interstate Commerce Act, supra, confer jurisdiction upon the State court. The question, we believe, is thoroughly settled against the contention of counsel for the appellant by decisions of the Supreme Court of the United States."

The court then in its opinion refers to several cases that were decided before the Transportation Act or the later Emergency Act was passed by Congress, and further states:

"The appellant sets up in its answer and makes an exhibit thereto various orders and rules of the Interstate Commerce Commission and the rules adopted by the United States Railroad Adminsitration relating to the supply and distribution of coal-cars, which were in effect during the period covered by the appellee's action. We deem it wholly unnecessary to set out and comment upon these rules and the authorities upon which the appellant relies to support its contention that the State court was without jurisdiction. We have examined all these rules and considered the authorities and especially the decision of the Interstate Commeerce Commission in the case of *Interstate Commerce Commission* v. *Victor American Fuel Co. and Salt Lake Rd. Co.*, of July 20, 1926, and we are convinced that these authorities have no application. As we construe the complaint, no attack is made by the appellees upon the rules and orders of the Interstate Commerce Commission relating to the supply and distribution of cars by railroads for the shipment of coal. We cannot discover in the complaint any allegation to the effect that the rules and orders of the Interstate Commerce Commission are unreasonable or unfair, that these rules themselves result in unlawful or un-

reasonable practice or in unjust discrimination or undue prejudice to shippers. That would involve an administrative question over which the Interstate Commerce Commission alone would have jurisdiction. * * *

"This is purely an action against the appellant company for its failure to furnish cars, which is its common-law and statutory duty, both Federal and State. But the allegations of this complaint show that this action is bottomed upon appellant's alleged failure to comply with its common-law or contractual, as well as statutory, duty to furnish cars under Sections 895 and 915, C. & M. Digest. According to the above decisions of the U. S. Supreme Court and our own court, appellees had the right to maintain this action under Section 22 of the Interstate Commerce Act. It follows that the court did not err in overruling the appellant's demurrer to the complaint. * * * *

"The only issue, as we have seen, that the court should have submitted to the jury was whether or not the appellant wrongfully failed, neglected or refused to furnish the appellees cars for the shipment of coal from their mines, and, if so, the amount of damages appellees were entitled to recover by reason of such neglect, re-

fusal or failure. The court submitted this issue to the jury, in instructions at the request of the appellees, in substantial conformity with the law as announced by this court in numerous decisions; (citing) Gage v. Arkansas Central Rd. Co., 160 Ark. 402, C. R. I. & P. Ry. Co. v. Simms, 161 Ark. 289,and Express Co. v. Bald Knob Fruit Exchange, 162 Ark. 588. In the last case we said: 'The law requires a carrier to make reasonable effort to provide instrumentalities for accommodating the business of the localities which it assumes to serve. This is not merely a statutory requirement, but it is an elementary principle originating in the common law.'"

Sections 895 and 915, Crawford & Moses Digest of the Statutes of Arkansas, 1921, to which the court refers and which makes it obligatory upon the railroad companies operating in the State of Arkansas to furnish cars upon the request of shippers, make the duty an absolute one regardless of any coal car shortages that may develop, and, therefore, the Supreme Court of Arkansas affirmed the action of the lower court in overruling the demurrer to the complaint, and also held that the trial court committed no error in giving the following instruction to the jury:

No. 2.

"If the defendant wrongfully failed, neglected

or refused to furnish plaintiffs, upon proper requests therefor by them, coal cars in which to ship the output of their coal mine, and plaintiffs were damaged by such refusal, your verdict should be for the plaintiffs." (R. 326).

And the following instruction:

No. 6.

"If you find for the plaintiffs and find that they could and would have made and received net profits on shipments of coal from June 22, 1922, to January 1st, 1923, beyond what they did actually receive during said period, if defendant had furnished sufficient coal cars to plaintiffs to take care of their coal shipments, then the plaintiffs are entitled to recover the amount of such additional net profits as damages in this suit, if such additional net profits are satisfactorily established by the proof."

The instructions given by the court which fallowed the Arkansas statutes make it the unqualified duty of a railroad company as a common carrier of coal to furnish all the coal cars that may be demanded by any coal mine in the state. The question involved is as to whether or not, regardless of the fact that Congress, in the Transportation Act of 1920 and

the later Emergency Act, has singled out coal as a commodity and vested the Interstate Commerce Commission with jurisdiction in the matter of the distribution of the available coal car supply, a cause of action can be predicated upon the failure to comply with the statutes of the state which make the duty absolute to furnish cars as demanded.

SPECIFICATIONS OF THE ERRORS RELIED UPON.

The petitioner makes the following assignments of error:

(a) The demurrer to the complaint should have been sustained.

(b) The error of the court in holding that a railroad company is required to furnish all coal cars that are demanded.

(c) The error of the trial court, which was affirmed by the Supreme Court, in instructing the jury that, if the defendant failed, neglected or refused to furnish the cars as demanded, it was liable for damages.

BRIEF OF THE ARGUMENT.

The only issue involved is one of jurisdiction in

the State Court under a State Statute for damages caused by the failure to furnish coal cars as demanded. Congress has singled out coal from other commodities and has clearly vested the jurisdiction in the matter of the distribution of cars in the Interstate Commerce Commission. The contention of the petitioner is that, in view of the existence of the Act of Congress and the rules of the Interstate Commerce Commission with references to the matter, some violation of those rules must occur before a cause of action would exist for a failure to furnish cars as demanded.

This court in the case of N. Y. C. & H. R. R. Co. v. Beaham, 242 U.S. 148, said:

> "The transactions in question related to the interstate commerce; consequent rights and liabilities depend upon acts of congress, agreement between the parties, and common-law principles accepted and enforced in Federal Courts. *And the carrier is entitled to the presumption that its business is being conducted lawfully.* (Citing) Southern Express Co. v. Byers, 240 U. S. 612. C. N. O. & T. P. R. Co. v. Rankin, 241 U. S. 319."

JURISDICTION OF INTERSTATE COMMERCE COMMISSION.

The Court of Appeals of Kentucky, in an opinion rendered as modified February 4, 1927, in the case of Louisville & N. R.R. Co. v. Brashear, et al. 289 S. W. Rep. 1094, in which the facts were similar to the case at bar, said:

> "The transactions in question related to the the fact that defendant failed to observe its filed rules, or any regulation made and promulgated by the Commission, and thereby discriminated against plaintiffs in the enjoyment of their rights as measured by such rules and regulations. In other words, the only jurisdiction the Perry circuit court had under the facts disclosed by this record when the action was filed was to inquire whether plaintiffs were receiving their just dues under the rules and regulations filed with and made by the Interstate Commerce Commission with reference to the furnishing of cars, and which were in force at the time of the transactions complained of. The action was based upon no such cause of complaint, but wholly and entirely upon the failure of defendant to furnish to plaintiffs a 100 per cent. supply of cars as required by our statute (Section 783), but which, as we have seen, was superseded from and after

the time Congress properly took jurisdiction of the matter."

In the "assigned car" cases, decided by this court May 31, 1927, in the case of U. S., et al., appellants, v. Berwind-White Coal Mining Company, et al., and other cases, the court held:

> "Under Paragraph 12 of Section 1 of the Interstate Commerce Act as added by the Transportation Act of 1920, which provided that it shall be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the mines served by it, that when the supply does not equal the requirements the carrier must maintain and apply just and reasonable ratings and count each and every car furnished to or used by any mine against such mine, and making failure to do so an offense for each car not so counted, the Interstate Commerce Commission shall have administrative discretion to determine how the cars shall be distributed."

In the case of Corona Coal Co. v. Southern Ry. Co., 266 Fed. 726, Judge Clayton rendered an exhaustive opinion on "the provisions of paragraph 12 of Section 1 of the Interstate Commerce Act, as amended by the Transportation Act of February 28,

1920," and after describing the method pursued in the distribution of coal cars says:

> "This case draws the line of demarcation between that class of complaints which may be heard by the courts and the other class that must be dealt with by the commission. If the practice itself is attacked as unfair and discriminatory, the exercise of the judgment and discretion of the commission is called for; but until that body had declared the practice to be discriminatory and unjust no court has jurisdiction of an interstate carrier for damages occasioned by the operation of such practice."

This question is also discussed in the opinion rendered by Judge Westenhaver in the case of Cleveland Western Coal Co. v. Baltimore & Ohio R. R. Co., 283 Fed. 995, and referring to the opinion of Judge Clayton in the Corona Coal Company case, he says:

> "Judge Clayton's views also accords with the present view of the Interstate Commerce Commission, which now has pending before it the question of whether the assigned car rule as applied by defendant is a just and reasonable distribution of cars among coal mines. If I am right in this conclusion, then, whether defend-

ants' method of car distribution is unfair or discriminatory becomes a question in the first instance for the Interstate Commerce Commission and the courts may not intervene until after that Commission has heard and determined the question."

The Circuit Court of Appeals for the Fourth Circuit in the case of B. & O. R. R. Co. v. Lambert Run Coal Co., 267 Fed. 776, discusses fully the power of the Commission under the Transportation Act, 1920, and says:

"The Congress has not, however, conferred on coal mines equality among themselves—the right of each mine in time of coal car shortage to be furnished cars in proportion to mine ratings, without regard to the public welfare and safety. Coal is a public necessity. From many causes, crises and emergencies may arise in mine operation, transportation, and unexpected needs of the public, which can not be anticipated and justly provided for by inelastic legislative enactment. It would be strange indeed if the Congress had guarded the private interests of the mines by an inflexible enactment of equality, lodging nowhere the power to relieve the public against unforeseen conditions which would make

rigid proportionate distribution of cars disastrous to the country or to some portion of it. This would be to confer benefits on individuals at the sacrifice of the public safety and welfare.

"We think the Congress has clearly conferred on the commission the power to grant relief in such conditions."

In the case of Director General of Railroads, et al, v. Viscose Co., 254 U. S. 498, Mr. Justice Clark, delivering the opinion of the Court, said:

"The contention of the carriers, faintly made, that the common law, and not the Interstate Commerce Act, furnished the measure of their obligation to the public, was promptly overruled by the Commission, informed, as it was, by wide experience in traffic affairs and in the administration of the act.

"The importance to the commerce of the country of the exclusive initial jurisdiction which Congress has committed to the Interstate Commerce Commission need not be repeated and cannot be overstated." (Citing cases).

TRANSPORTATION ACT.

Sections 12, 13, 14 and 15 of the Act of Congress

known as the "Transportation Act," approved February 28, 1920, were pleaded in the answer, and appear at pp. 9-10 of the record, and also Sections 2, 3 and 4 of the Act of Congress approved September 22, 1922, which appear in the record at pp. 10-11, and the defendant also pleaded and filed, as Exhibit "A" to its answer, Circular CS-31 (Revised), issued by the United States Railroad Administration Car Service Section during the period of Federal control. Said exhibit appears in the record at pp. 14 to 21 inclusive. This circular was also introduced in evidence (R. 235-242 incl.).

This Court, in the case of U. S. of America v. New River Co., 265 U. S. 534, said:

> "This suit was brought by the appellees against the Cheaspeake & Ohio Railway Company and the Virginian Railway Company, competing interstate carriers by railroad, the United States, and the Interstate Commerce Commission, to enjoin the carriers from applying a certain rule (rule 4 of Circular CS-31, revised) for the distribution of coal cars, and to set aside for the decision and order of the Commission of December 11, 1922, in certain proceedings instituted by the appellees against the defendant carriers. * * * * These rules were established during

the period of Federal control of the railroads. After the expiration of that period, the Commission issued a notice, dated March 2, 1920, recommending to carriers and shippers that the rules be continued in effect until experience and further study demonstrated that others would be more effective and beneficial. They were continued by carriers generally."

This court, in the case of U. S., et al., v. Berwind-White Coal Mining Co., et al., (Assigned Car Cases) supra, also held:

"The Commission contends that Paragraph (12) does not prescribe a complete rule; that it does not require either pro rata distribution of cars or distribution according to the Hocking Valley-Traer rule; that it requires merely that all cars be counted as the basis for determining the pro rata share of each mine; and that it leaves to the Commission administrative discretion to determine how the cars shall be distributed. The Commission's contention is, in our opinion, the sound one."

CONCLUSION.

Petitioner respectfully submits that since the Transportation Act of February 28, 1920, and the

latter act of 1922, these two acts of Congress constitute the sole and supreme law governing the distribution of coal cars during the period alleged in the complaint, and that a suit for damages based upon alleged discrimination in furnishing cars or the failure to furnish a particular mine with cars necessarily involves a violation of these acts of Congress and the orders of the Interstate Commerce Commission made thereunder, and such a suit cannot be based upon a common-law obligation or the statutes of Arkansas to furnish cars as they have been superseded by the Acts of Congress. It is respectfully submitted, therefore, that the judgment of the Supreme Court of Arkansas should be reversed.

Respectfully submitted,

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